No. 1617

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, *Petitioner*

v.

KENTUCKY FINANCE COMPANY, INC. AND KENTUCKY DISCOUNT, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. LEE RANKIN,
Solicitor General,
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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on April 15, 1958.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (IR. 109a-112a)[1] are reported at 150 F.

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[1] "R." references preceded by Roman numerals are to Volumes I, II, or III (as the case may be) of respondents' record appendix in the court below. "PR." references are to petitioner's appendix in the court below.

Supp. 368. The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-7a) is reported at 254 F. 2d 8.

JURISDICTION

The judgment of the Court of Appeals was entered April 15, 1958 (App. A, *infra*, p. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the business of making small loans on credit and purchasing accounts receivable (*i.e.*, conditional sales contracts) constitutes "sales of goods or services" by a "retail or service establishment" within the meaning of the exemption provided in Section 13(a)(2) of the Fair Labor Standards Act.

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), are set forth in Appendix B, *infra*, pp. 8a-9a. The provision particularly involved here is Section 13(a)(2) which reads as follows:

> The provisions of sections 6 and 7 shall not apply with respect to * * * any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services

(or of both) is not for resale and is recognized as retail sales or services in the particular industry; * * *.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondents from violating the overtime and record-keeping provisions of the Act with respect to office workers jointly employed by them in their small loan and discount business.

1. Respondents are affiliated corporations, having common corporate officers (IR. 9a), a common manager (IR. 35a), and a common office force consisting of nine full-time and two part-time employees (IR. 5a). They maintain a joint office in Louisville, Kentucky, where they are engaged in lending money on credit to borrowers, resident in Kentucky and Indiana (IR. 9a, 12a, 24a), at the maximum interest rate permitted by Kentucky's small loan act[2]; in selling these borrowers' protective life insurance (IR. 10a) which is issued by The Credit Life Insurance Company of Springfield, Ohio (IR. 51a); and in purchasing accounts receivable (conditional sales contracts) from appliance and furniture dealers (IR. 110a). As the trial court found, respondents' small loan business, conducted in the name of Kentucky Finance, accounts for approximately 60 percent of their gross dollar volume of business and the remaining 40 percent is derived from the discount phase of their business, which is handled by the Kentucky Discount affiliate (IR. 110a).

[2] These rates are 3½ percent per month on unpaid balances not exceeding $150, and 2½ percent per month on any part thereof exceeding $150 (Kentucky Revised Statutes, Ch. 288).

2. In a pre-trial stipulation, respondents admitted non-compliance with the Act's overtime and record-keeping provisions (IR. 7a). At the trial, it was conceded that their joint office employees were "engaged in commerce or in the production of goods for commerce" within the meaning of the Act and that an injunction should issue unless, as they contended, they are entitled to the amended "retail or service establishment" exemption provided in Section 13(a)(2) of the Act, *supra*, pp. 2-3 (IR. 22a). With the case in this posture, respondents endeavored to show that, in lending money and buying accounts receivable, they were making "sales of goods or services" and that such sales were "recognized as retail" in the industry. In addition, since the legislative history of this exemption indicated (by express statements in the reports of both the Senate and the House of Representatives) that the provision was not intended for such businesses as "banks, insurance companies, building and loan associations, [and] credit companies" (House Managers' Statement, 95 Cong. Rec. 14932; Senate Conferees' Report, 95 Cong. Rec. 14877), respondents also sought to show that the term "credit companies" does not include small loan companies. In support of these contentions, respondents offered the "expert" evidence of Dr. Morris R. Neifeld and similar evidence and exhibits used by Household Finance Corporation in *Tobin* v. *Household Finance Corp.*, 106 F. Supp. 541 (E.D. Pa.), reversed, 208 F. 2d 667 (C.A. 3), it having been stipulated that the evidence and exhibits in that case might be considered as evidence in this case (IR. 13a-14a).[3] Dr. Neifeld, an economist, is

[3] The reversal in *Household* was based solely on the ground that there was no employment in commerce within the meaning of the

Vice President and a director of Beneficial Management Corporation, the managing corporation of Beneficial Finance Company, a loan organization with 972 branch offices located in 44 states and in Canada and Hawaii (IR. 56a-58a). Respondents' other principal witness, Leon Henderson, testified in the *Household* case. His testimony was "based on his experience, commencing with his work with the Russell Sage Foundation, and the studies made in connection therewith" (respondents' brief below, p. 7).[4]

3. Although the Government believes it is clear that there are some types of businesses which are not eligible for the Section 13(a)(2) exemption regardless of the amount or kind of evidence that might be adduced, and that one of these is the money lending business, the Government took the precaution of presenting rebuttal evidence in *Household;* by stipulation, that evidence is also a part of the record in the instant case. It consists of the testimony of three economists who were well versed in the operation of the small loan business and the position it occupies in the financial industry and in the general organization of our economy. These witnesses all testified that loan companies are not "service establishments" within the generally

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Act. Accordingly, the Third Circuit found it "unnecessary to go into the question whether the defendant is within the 'retail or service' exception to the statute" (208 F. 2d at 672), and left the District Court's ruling on that question undisturbed. In *Household,* unlike here, loans were not made to out-of-State borrowers and the coverage of the Act was vigorously contested, in addition to the exemption claimed under Section 13(a)(2).

[4] The Russell Sage Foundation studies to which reference is made had to do with the "small loan problem" (IIIR. 257). As a result of those studies, the Foundation recommended passage of small loan legislation that would permit a maximum interest rate of 3.5 percent a month on loans under $300.00 (IIIR. 259).

accepted meaning of the term.[5] They are "engaged in the business of making loans or lending money, which has a different connotation" (PR. 10a). The concept of marketing is absent from loan transactions (PR. 20a, 23a, 24a). Money is not a "commodity" or "something you can consume" (PR. 24a). On the contrary, as respondents' own evidence shows, it is money that makes it possible to buy goods and services. "Only with [money] can food, clothing, shelter, recreation be secured" (Ex. D-5 (k), IIIR. 291). Money "facilitates the exchange of goods" (Neifeld, IR. 99a). For this reason, financial institutions, including loan companies, are not listed under the "service" category in such publications as the "Standard Industrial Classification Manual" (a Government classification developed by a committee of experts so as to "conform to the structure of American industry and to general usage, to the attitudes of businessmen and government administrators in the field" (PR. 11a)). They are in a separate category—"finance, insurance and real estate" (PR. 11a-12a).

The Government's witnesses also testified that the retail-wholesale concept has no application to the financial industry, including the small loan business. The "classification is simply not relevant to the field

[5] While the witnesses for Household and respondents' witness in this case testified that they looked upon the making of loans as a "service" function, they proceeded upon the theory that *all* economic endeavor constitutes either the sale of goods or services. Mr. Henderson expressly stated that he proceeded on this broad assumption (PR. 27a), and Household's other expert witnesses, Schmus and Dreibelbis, agreed generally with his testimony without indicating any different or more limited concept of the "service" category which they applied to the business of making loans (IIR. 145)—as did Dr. Neifeld, also, when he testified in the instant case (IR. 77a).

of finance" (PR. 13a). It applies to the mercantile field, and, as Household's own literature recognizes, "Merchandising and banking are two distinct businesses" (see *Financing the American Family*, Ex. D-5 (k), IIIR. 275, at 301). As to the use of the terms "retail" and "wholesale" in such literature, the Government's witnesses stated that it was so used only by way of analogy.[6] When some people refer to the "small loan field" as retail, they are saying that the small loan business "has certain problems which are analogous to those of the grocery store, * * *. But that is a very different thing from jumping to the conclusion that the small loan company is a retailing establishment in the same sense that a grocery store or any other retail establishment is" (PR. 14a-15a).

As to the general term "credit companies," the Government's witnesses testified that it would include personal loan or finance companies. Small loan companies are just as much credit companies "as is any other business that deals primarily in credit" (IIR. 168). Their

[6] Although Dr. Neifeld disclaimed that the terms "retail" and "wholesale" are used in the small loan business in an analogous sense, his explanation of the use of such terminology by writers in the field was that "they generally do, *especially when they are trying to justify, or explain rather is the word, why these small loans have to have a higher rate*" (IR. 76a-77a; emphasis added). That this is the reason the terms are used by the industry is clear from the literature in which they appear. See this material, most of which consists of institutional advertisements (IIIR. 235-321; IIR. 126-137). See also the testimony of Mr. Henderson that in his work with the Russell Sage Foundation, which sponsored passage of small loan legislation, the "principal thing" that brought forward the idea of comparing small loan companies to retailers "was the discussion (if that is a strong enough word) of the need for a higher than the banking rate or the established usury law rate in the state"—*i.e.*, it was part of the "argument" or "fortification" (PR. 25a).

testimony was corroborated by respondents' own witnesses in this case. While Dr. Neifeld stated that he had some difficulty with the term because "there is a specialized group known as commercial credit companies," he readily agreed, when the question was rephrased by substituting "institutions" for "companies," that the term would include personal loan companies (IR. 85a-86a).[7]

4. The District Court held here that "The lending of money does not constitute the sale of either goods or services within the intendment of the Section 13(a)(2) exemption", and denied the exemption (IR. 111a). Although it found that "local offices of small loan companies are regarded in the financial industry as retail service establishments," this finding was qualified by the preface: "Subject to the same qualifications expressed by Chief Judge Kirkpatrick in Tobin v. Household Finance Corp., 106 F. Supp. 541 (D.C.E.D. Pa.), and Judge Day in Mitchell v. Aetna Finance Company, 144 F. Supp. 528 (D.C. R.I.)" (*ibid.*). These "qualifications," as Judge Kirkpatrick had explained, are that the expressions "service" and "retail" in the financial industry (in contrast to their usage in the "mercantile field" where "the classification has a practical value, because of differences in customary treatment of wholesale and retail sales of commodities") reflect simply the "very broad generic sense" and "overworked" usage of the terms, serving no special purpose and meaningless in the context of the

[7] When this same witness testified in *Aetna Finance Co. v. Mitchell*, 247 F.2d 190 (C.A. 1), he stated that any financial institution "that furnishes credit as a service is a credit institution," including sales finance companies and personal finance companies. "*They are all credit companies*" (*Aetna* Record, p. 43; emphasis added).

Section 13(a)(2) exemption (106 F. Supp. at 544-545).

The Court of Appeals, with Judge Miller dissenting, reversed. Stating that the "language of the '49 Amendment is clear and unambiguous," the majority dismissed the Amendment's legislative history with the statement that "[w]hile some of the legislative history of the amendment may suggest another purpose in derogation of the plain language of the amendment, such assumed purpose need not control" (App. A, *infra*, pp. 5a-6a), and placed main reliance on the Fifth Circuit's opinion in *Mitchell* v. *T. F. Taylor Fertilizer Works*, 233 F. 2d 284 (App. A, *infra*, pp. 4a-5a).

REASONS FOR GRANTING THE WRIT

The decision below conflicts directly with the recent unanimous ruling of the Court of Appeals for the First Circuit in *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190, as well as with the decisions of the district courts that have ruled on the issue. In ignoring the legislative history of the exemption in Section 13(a)(2) of the Fair Labor Standards Act, the opinion is also inconsistent with this Court's numerous holdings construing the Act in the light of its legislative history, particularly *Mitchell* v. *Bekins Van & Storage Co.*, 352 U.S. 1027, and *Steiner* v. *Mitchell*, 350 U.S. 247, as well as with the well-settled principle that any exemption from this Act must be "narrowly construed" and restricted to those "plainly and unmistakably within its terms and spirit" (*Phillips, Inc.* v. *Walling*, 324 U.S. 490, at 493). The issue presented would be of large importance even if it were limited to workers employed in the small loan industry, but it is greatly magnified by the implications of the opinion which

would enable many other industries heretofore unquestionably ineligible for the Section 13(a)(2) exemption to lay claim to it.

1. As appears from its face, the decision below is in direct conflict with the First Circuit's decision in *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190,[8] and with the decisions of the district courts that have ruled upon the status of small loan companies under the Fair Labor Standards Act's amended "retail or service establishment" exemption—*i.e.*, in addition to the district court whose decision was reversed in the instant case, the district courts in the *Aetna Finance* case, *supra*, and in *Tobin* v. *Household Finance Corp.*, 106 F. Supp. 541 (E.D. Pa.), reversed on other grounds *sub nom. Mitchell* v. *Household Finance Corp.*, 208 F. 2d 667 (C.A. 3). All of these courts have held that the credit or money lending business is simply not the type of business to which the retail sales concept has any application, and hence that there is no occasion to consider the percentage or industry recognition tests prescribed in the Section 13(a)(2) exemption, as it was amended in 1949 (*supra*, pp. 2-3).[9]

In *Aetna Finance*, the company advanced precisely the same argument here accepted by the Sixth Cir-

[8] The Sixth Circuit expressly noted (App. A, *infra*, p. 4a) that the trial court's decision in this case rested on substantially the same reasoning as the First Circuit's decision in *Aetna*.

[9] As shown by its terms, the applicability of the exemption provided in Section 13(a)(2) depends, in the very first instance, upon whether the establishment is a "retail or service establishment" engaged in making "sales of goods or services (or of both)." Only after that has been affirmatively found can the percentage-of-sales tests come into play. Also, the provision requiring recognition of the sales or services "as retail sales * * * in the particular industry" applies only to establishments basically falling within the term "retail or service establishment." See *infra*, pp. 13-14, 15-16.

cuit—that the 1949 Amendments enacted a self-contained "unambiguous" and "entirely new and controlling" definition of "retail or service establishment" which made resort to legislative aids unnecessary (respondents' brief below, p. 24). The First Circuit, apparently deeming this contention so tenuous as to require no comment, proceeded to examine the legislative history of the amended exemption and concluded that small loan companies were clearly outside the contemplated scope of this exemption. Not only was there no evidence of any legislative intent to include them, said the court, but the contrary intent was made "explicitly clear" by the statements of the sponsors and the committee reports "that the proposed amendment would do nothing to change the non-exempt status of 'banks, insurance companies, *credit companies,* newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc.' " (247 F. 2d at 193; emphasis the court's).

In answer to Aetna's evidence and contentions on the "industry recognition" point (which were identical to the evidence and contentions of respondents below), the First Circuit pointed out that "the sponsors of the amendatory legislation repeatedly disavowed an intention to permit each industry to decide for itself whether it was conducting a 'retail or service establishment' within the meaning of the exemption" (*ibid.*). The evidence of Aetna's "experts," said the court, was simply "to the effect that, in the small loan industry, there was some disposition (in a more or less rough analogy borrowed from the mercantile field) to refer to small loans to individuals as 'retail financing' in contrast to 'wholesale' lending institutions which dealt with industry through either buying accounts

receivable or financing inventories" (247 F. 2d at 193).[10] "Such usage," the court stated, "hardly has relevance to the intended meaning of the term 'service establishment' as used in § 13(a)(2)" (*ibid.*).

The trial court in the instant case also concluded that respondents' evidence on the percentage and recognition tests was "immaterial" (IR. 111a) for the reason, among others, that "The lending of money does not constitute the sale of either goods or services within the intendment of the Section 13(a)(2) exemption" (IR. 111a). Similarly, the District Court in *Household, supra,* stated: "The fact is that there are certain types of transactions which simply cannot be fitted into the category of performing services at retail and any attempt to do so" [by expert testimony that "every form of economic transaction resulting in gain to either party must necessarily be a sale or the performance of a service"] "creates an anomaly" (106 F. Supp. at 547).

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[10] As pointed out in the Statement, *supra*, p. 3, respondents' operations are not limited to the making of small loans but also include the buying of accounts receivable from appliance and furniture dealers. While Dr. Neifeld testified that the latter operations were also considered "retail" in the industry, his testimony in this regard is contradicted by the testimony of the *Household* witnesses given in connection with Household's contention that the general term "credit companies" does not include small loan companies. On this point, the *Household* witnesses stated that the term "credit companies" is not one "that is used in the banking fraternity" (IIR. 141, 149) and vaguely suggested that it was used somewhere—perhaps colloquially—not to describe small loan companies, but "commercial" credit companies which they said are engaged in making "credit or loans available to business establishments" (IIR. 141), "*purchas*[*ing*] *accounts receivable*," etc. (IIR. 149; emphasis added). Because of respondents' extensive discount operations—which constitute 40 percent of their total business—the exemption is even more clearly inapplicable in the instant case than in *Aetna*.

2. In ignoring the legislative history of the 1949 Amendments, the court below is inconsistent, not only with this Court's decision in *Steineer* v. *Mitchell*, 350 U.S. 247, as indicated by Judge Miller in his dissent (App. A, *infra*, p. 7a), but with many other decisions in which the Court has construed the Act in the light of its legislative history. See, *e.g.*, *Phillips, Inc.* v. *Walling*, 324 U.S. 490; *Mitchell* v. *Bekins Van & Storage Co.*, 352 U.S. 1027 (both of which deal with the Section 13(a)(2) exemption).

In *Bekins*, which is the only Section 13(a)(2) case to be considered by this Court since the 1949 Amendments, the respondent advanced the same broad interpretation adopted by the Sixth Circuit in the instant case and also relied heavily on the Fifth Circuit's decision in *Mitchell* v. *Taylor Fertilizer Works, Inc.*, 233 F. 2d 284. While *Bekins* did not deal with the precise aspect of the exemption presented in this case, respondent's contention there, as here, rested on the premise that "Section 13(a)(2) was amended in its entirety in 1949" and that the "new and specific tests provided by the amended section" were controlling (brief in opposition to petition for certiorari in *Bekins*, pp. 20-22). In rejecting respondent's contentions, this Court merely cited its pre-1949 decision in *Phillips, Inc.* v. *Walling*, *supra*, and made a reference to the specific parts of the legislative history (95 Cong. Rec. 12579) which plainly demonstrate the error of the general view adopted by respondents here, the respondent in *Bekins*, and the Fifth Circuit in *Taylor Fertilizer*.

As pointed out in our brief on the merits in *Bekins* (p. 26, fn. 9), although the *Taylor Fertilizer* decision was believed to be clearly erroneous, no petition for certiorari was filed "because the peculiar nature of

the fertilizer business and the special character of Taylor's operations [were] not thought to be sufficiently representative of the general problem presented by the new Section 13(a)(4).'"[11] Also, it was thought that this Court's decision in *Bekins* might serve to resolve any problems arising from the erroneous *Taylor* opinion. However, not only has the Fifth Circuit adhered to and extended the basic rationale of *Taylor* (*Ben Kanowsky, Inc.* v. *Arnold*, 250 F. 2d 47, modified, 252 F. 2d 787, pending on petition for certiorari, No. 32-Misc., this Term),[12] but *Taylor's* far-reaching implications have been affirmed and so exemplified by the Sixth Circuit's decision in the instant case that the present need for further guidance from this Court is evident.

3. The importance of the issue presented, even if its impact were limited to employees of similar loan and sales finance companies, is shown by the large number of such companies and the even larger number of branch offices that they operate. According to a survey of the industry, made by the Federal Reserve System (published in the April, 1957, issue of the Federal Reserve Bulletin, pp. 392-400), there were 3,180 personal finance or small loan companies in the country as of June 30, 1955, and these companies operated a total of 8,830 branch offices. In addition, there were 2,620 sales finance or discount companies as of the same date, with nearly 6,000 branches. The total employment in the industry obviously runs into many

[11] As noted above (fn. 9, p. 10), the applicability of this exemption depends upon whether the establishment claiming it is a "retail or service establishment" within the meaning of Section 13(a)(2).

[12] The Government is filing a brief in support of this petition.

thousands. See Moody's Bank and Financial Manual for 1956, which shows a total in excess of 18,500 employees in the six largest companies.[13]

But the decision, resting as it does on the premise that every business rendering "service" in the broadest generic sense "is retail if it answers to the three tests provided by the '49 Amendment" (App. A, *infra*, p. 4a), has implications almost as far-reaching as the scope of the Fair Labor Standards Act itself. As appears from the First Circuit's *Aetna* decision, shortly after the Act was enacted a large number of businesses, including banks, building and loan associations, personal loan companies, newspapers, electric and gas utilities, etc., laid claim to the Section 13(a)(2) exemption, each asserting that it was engaged in rendering "service" (247 F. 2d at 192). Although it was settled by the early court decisions that the exemption was not so broadly intended but was limited to service establishments which have the ordinary characteristics of a retail establishment except that they sell services instead of goods, such as barber shops, beauty parlors, shoe-shine parlors, and the like (*Kirschbaum Co.* v. *Walling*, 316 U.S. 517, affirming, *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. 2d 567 (C.A. 3) and *Fleming* v. *Arsenal Bldg. Corp.*, 125 F. 2d 278 (C.A. 2); *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13 (C.A. 8); *Reynolds* v. *Salt River Valley Water Users Ass'n.*, 143 F. 2d 863 (C.A. 9); *Sun Publishing Co.* v. *Walling*, 140 F. 2d 445 (C.A. 6), certiorari denied, 322 U.S. 728), the rationale of the decision below would allow

[13] This included the organization of Dr. Neifeld (respondents' witness), Beneficial Finance, as well as Household Finance Corporation.

all "service" businesses to qualify for the exemption by adducing so-called "expert" testimony that their services "are recognized as retail in the particular industry."[14]

Not only does the decision below thus confuse and unsettle a large and important area of the Act's application which had previously been regarded as well settled, but it would, in every case in which the exemption is now claimed, impose upon the Administrator and the courts the complicated and expensive inquiry illustrated by the record in this case.

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[14] As noted in the Statement, *supra*, p. 4, both Houses expressly stated that the amendment to Section 13(a)(2) was not intended to exempt such businesses as "banks, insurance companies, building and loan associations, credit companies, newspapers, telephone companies, gas and electric utility companies, telegraph companies, etc." Senator Holland, who sponsored the amendment in the Senate, pointed out that "these types of businesses are not considered exempt under the retail or service establishment exemption in the present law" and that "the proposed amendment would do nothing to change their nonexempt status" (95 Cong. Rec. 12505-12506). He also explained that "to the extent that Congress intended to exempt any of these businesses it created special exemptions for them" (referring to the special exemptions for small weekly and semi-weekly newspapers in Section 13(a)(8); for local trolleys and motor bus carriers in Section 13(a)(9); and for switchboard operators of small telephone exchanges in Section 13(a)(11)). *Ibid.*

Every reference in the legislative debates to the type of establishment to which the amended section would apply was in the same terms as described in *Kirschbaum* and the other decisions cited in the text, *supra*, p. 15. See these debates as compiled in Supplemental Appendix to the Brief of the Secretary of Labor in the *Aetna* case, pp. 8, 13, 14, 20, 53, 63, 65, 66, 72 (copies of which are being filed with the Clerk). Note, too, that the *Kirschbaum* decision was expressly approved on the exemption point (Supplemental Appendix, pp. 10, 70).

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted.

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JULY 1958

APPENDIX A

No. 13287

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENTUCKY FINANCE COMPANY, INC. and KENTUCKY DISCOUNT, INC., *Appellants,*

v.

JAMES P. MITCHELL, SECRETARY OF LABOR, *Appellee.*

APPEAL from the United States District Court for the Western District of Kentucky.

Decided April 15, 1958

Before SIMONS, Chief Judge, ALLEN and MILLER, Circuit Judges.

SIMONS, Chief Judge. The appeal presents an issue as to the application of the Fair Labor Standards Act to the employees of a small loan office in Louisville, Kentucky, Title 29, Sections 201 et seq. The original Act by section 13 (a) (2) exempted from its operation "any employee engaged in a retail or service establishment the greater part of whose selling or servicing is in intrastate commerce. . . ." Dissatisfaction having arisen with the administrative application of the judicially determined test of "consumer use" in deciding what was a "retail or service establishment," section 13 (a) (2) was amended in 1949 so that the exemption covers "any employee employed by any retail or service establishment, more

than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

The question was presented to the District Court by the Secretary in the third of a series of three test cases by a petition for an injunction which, as granted, permanently enjoins the appellants from violating the Fair Labor Standards Act in their small loan establishment at Louisville. By this action, as in others elsewhere, the Secretary seeks a determination that a small loan establishment of the nature of the appellants is not exempted from the overtime provisions of the Act. There is no dispute as to the facts which by stipulation imported into the case evidence introduced in support of a petition in the first test case in Pennsylvania styled *Tobin* v. *Household Finance Corporation*, 106 F. Supp. 541, reversed by the Court of Appeals of the Third Circuit because the employees there involved were not engaged in commerce within the meaning of the Act and, therefore, not covered by it. *Mitchell* v. *Household Finance Corporation*, 208 F. (2d) 667.

The stipulated facts show that appellants operate a small loan business in Louisville, extending credit to individuals for payment of consumptive goods or services, that the individual accorded credit has consumed, or will consume, and in the purchase at a discount of conditional sales agreements evidencing the purchase of household appliances. Kentucky Finance Company, Inc. is a corporation which carries on the first phase of this operation and Kentucky Discount is a corporation whose activity is in the second phase, though the employees of both corpora-

tions being engaged in each of these activities, conducted at one place of business. In the Discount activity, credit was generally extended to the purchaser of household appliances and not to the dealer, although the Discount company had recourse to the dealer in approximately 25% of its discount transactions. Ninety percent or more of the appellants' business was solely with Kentucky residents and in no case was resale contemplated or involved. It may confidently, therefore, be concluded that the two appellants constituted a single business unit engaged in the loaning of money to individuals for their use in paying for goods that they consumed and meets the requirements of the exemption amendment as doing business within the State.

At the outset, two issues were by the petition presented. One was whether the employees of the appellants were engaged in interstate commerce to such degree as called for the application of the Fair Labor Standards Act or, if so, whether their activities are recognized as retail sales or services in the particular industry.

Upon the appellants' concession that some of their employees are engaged in interstate commerce to such degree as to warrant the application of the Act, the first issue disappears and need be given no consideration. The sole question, therefore, on this appeal is whether the appellants are conducting a "retail or service establishment" within the meaning of the 1949 Amendment. In support of their contention, expert witnesses from the financial industry gave evidence that appellants' business therein was recognized as a retail business. The District Judge accepted this evidence as proving an "ultimate fact." The Secretary of Labor, in response, produced evidence that the generally understood definition of "retail" had no application to the financial industry but there was no evidence on his behalf as to how the appellants'

business was characterized in the financial industry itself. The District Court concluded that the appellants were not a retail or service establishment and granted the injunction sought. From this determination the case has been brought here for review.

The Secretary's three test cases are *Tobin* v. *Household Finance Corp.*, 106 F. Supp. 541, *Mitchell* v. *Aetna Finance Co.*, 144 F. Supp. 528, and the present case *Mitchell* v. *Kentucky Finance Co., Inc.*, 150 F. Supp. 368. In all three cases in the District Court, the Secretary's contention was sustained. Prior to the present appeal, the *Household Finance* case, *supra*, was reversed by the Court of Appeals of the Third Circuit, *Mitchell* v. *Household Finance Corporation*, 208 F. (2d) 667. The Court there did not come to grips with the issue here involved, reversing on the ground that the employees therein concerned were not involved in interstate commerce. It does not, therefore, stand as a precedent to guide us in reaching decision. The *Aetna Finance Company* case, *supra*, reached the Court of Appeals of the First Circuit and was affirmed on substantially the same reasoning as that of the trial judge, 247 F. (2d) 190.

The Court of Appeals for the Fifth Circuit had no difficulty in determining that an establishment is retail if it answers to the three tests provided by the '49 Amendment. *Mitchell* v. *T. F. Taylor Fertilizer Works*, 233 F. (2d) 284. It followed its own decision in *Boisseau* v. *Mitchell*, 218 F. (2d) 734, wherein it was said, in reference to the requirement that the sale of goods or services, or of both, must be recognized in the particular industry as retail sales or services: "Under this test any sale or service, regardless of the type of customer, will have to be treated by the Administrator and Courts as a retail sale or service so long as such sale or service is recognized in the particular industry as a retail sale or service."

In the *Taylor* case, *supra,* decided by a different panel of the Court of Appeals of the Fifth Circuit, Judge Tuttle pointed out that industry members were unanimous in their opinions on the question that sales of fertilizer to consuming farmers were recognized as retail in the fertilizer industry and offered a reasonable basis for their distinction which cannot be rejected because they were interested parties. He reasoned: "The fact that Congress referred the matter to industry recognition indicates that it intended a more flexible rule, adaptable to the many various branches of industry. In the determination of what is recognized as 'retail' in an industry, the opinion of industry members would be relevant, and the trial court did not err in basing its finding of fact upon their testimony." We find these cases highly persuasive in recognizing that the appellants' operations constituted a retail establishment. The evidence that it was so considered by the industry is cumulative, both in oral testimony of highly qualified experts in the financial industry and from the writings of those engaged in it. It is not in any measure refuted by those familiar with and active in the industry.

The language of the '49 Amendment is clear and unambiguous. It requires no interpretation by general observations made in respect to other industries or activities. The Congress in enacting the Fair Labor Standards Law was concerned with leaving primarily local activities within the control of the States. In enacting the '49 Amendment, it obviously avoided reliance solely on the minimum percentages of the amendment, nor mainly upon the resale qualification. In obvious caution it added the significant requirement of recognition by the industry itself. It is not controlling that the term "retail" may have in another environment and under other circumstances a different connotation. As has often been said, when considering the plain language of legislation, the Congress has

created its own lexicon. It is within the capacity and function of legislative bodies so to do. Not only did it do so in the '49 Amendment but also in section 3 (k) of the Act, wherein it defined "sale" to include not only exchanges, contracts to sell, consignment for sale, shipment for sale, but added "or other disposition" and where in subsection (i) it defined "goods" as meaning not merely wares, products, commodities, or merchandise, but added "articles or subjects of commerce of any character." It would indeed be an anomaly if by the very intangibles by which an activity is brought within the scope of the commerce clause it should now be denied a clearly defined exemption.

While some of the legislative history of the amendment may suggest another purpose in derogation of the plain language of the amendment, such assumed purpose need not control. As was said by Mr. Justice Frankfurter, in *10 E. 40 St. Co.* v. *Callus*, 323 U. S. 578, 583: "Dialectic inconsistencies do not weaken the validity of practical adjustments as between the State and Federal authority, when Congress has cast the duty of making them upon the courts." Even so, Senator Holland, in sponsoring the bill, stated that a retail establishment is to be "defined variably in various industries by determining what are the habits and practice in the industry. . . . The well settled habits of business must be applied. They will not necessarily be the same in all trades or businesses." 95 Cong. Rec. 12510, and Senator Taft commented: "Hardly an industry can be found in which the question of what is retail and what is wholesale has not been settled for years. It is a question of fact just as much as any other question of fact." 95 Cong. Rec. 12516. Here, the facts of record speak for themselves.

Reversed with instruction to the District Court to set aside the injunction.

MILLER, dissenting. I am of the opinion that in view of the legislative history of the 1949 Amendment of the Fair Labor Standards Act, Section 213 (a) (2), Title 29, U. S. Code, as set out and discussed in *Tobin* v. *Household Finance Corp.*, 106 F. Supp. 541, E. D. Pa., and *Mitchell* v. *Aetna Finance Co.*, 144 F. Supp. 528, D. R. I., the judgment should be affirmed. *Steiner* v. *Mitchell*, 215 F (2d) 171, C. A. 6th, affirmed, 350 U. S. 247.

Judgment

(Filed April 15, 1958)

Appeal from the United States District Court for the Western District of Kentucky.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed, with instruction to the District Court to set aside the injunction.

APPENDIX B

The Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201), provides in pertinent part:

SEC. 7. [63 Stat. 912-913]:

(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 13 [63 Stat. 917]:

(a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or (3) any employee employed by any establishment engaged in laundering, cleaning or repairing clothing or fabrics, more than 50 per centum of which establishment's annual dollar volume of sales of such services is made within the State in which the establishment is located: *Provided*, That 75 per centum of such establishment's annual dollar volume of sales of such services is made to customers who are not engaged in a mining, manufacturing, transporta-

tion, or communications business; or (4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *.